BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAWRENCE R. LOWDON	)	
Claimant	)	
VS.	)	
	)	Docket No. 196,237
AFFILIATED FOODS, INC.	)	
Respondent	)	
AND	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the Award dated January 27, 1998, entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on August 26, 1998.

APPEARANCES

Matthew S. Crowley of Topeka, Kansas, appeared for the claimant. Steven J. Quinn of Kansas City, Missouri, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Appeals Board, the parties stipulated that claimant's last day of work for respondent was August 5, 1996.

ISSUES

After finding that claimant's permanent injury and impairment stemmed from his October 26, 1993, work-related accident, the Administrative Law Judge awarded claimant a 6 percent permanent partial general disability for the period that he continued to work for respondent through August 5, 1996, and a 98.25 percent permanent partial general disability for the period following that date. Respondent and its insurance carrier requested the Appeals Board to review the Judge's finding of nature and extent of disability and the

compensation due, which in this instance includes reviewing the date or dates of accident. Those are the only issues before the Appeals Board on this appeal.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) In 1980 Lawrence Lowdon began working for Affiliated Foods, Inc., a grocer's supplier. On October 26, 1993, while performing his assigned job duties as a truck loader, Mr. Lowdon injured his low back and left hip when he was thrown from an electric jack.

(2) Despite ongoing and progressively worsening low-back symptoms, Mr. Lowdon continued to work for Affiliated Foods, Inc. through August 5, 1996. At that time, Mr. Lowdon had attempted to perform several temporary light duty jobs without much success and he and the warehouse director concluded that there were no other jobs in the warehouse that Mr. Lowdon could perform.

(3) Shortly after Mr. Lowdon was sent home due to the lack of accommodated work, Affiliated's workers went on strike. Mr. Lowdon was never called back to work.

(4) In December 1994, Mr. Lowdon filed this claim with the Director and alleged accidental injury from October 26, 1993, through the filing date. In April 1996, Mr. Lowdon filed an amended application for hearing alleging a period of accident from October 26, 1993, to December 26, 1995. In an Application for Preliminary Hearing filed with the Director, Mr. Lowdon alleged a date of accident of October 26, 1993, to December 26, 1995, and ongoing.

(5) Because of the work-related low-back injury, Mr. Lowdon now has a 6 percent whole body functional impairment. That conclusion is based upon the opinion of orthopedic surgeon Robert M. Drisko II, M.D., who testified that Mr. Lowdon had a whole body functional impairment of 5 to 7 percent due to his sacroiliac dysfunction. The record does not disclose any apportionment between any permanent injury that may have been sustained in the October 26, 1993 incident from any permanent injury that may have been sustained after that date while Mr. Lowdon continued to work for Affiliated.

(6) The period of accident in this claim stretches from October 26, 1993, through Mr. Lowdon's last day of work for Affiliated on August 5, 1996. For purposes of computing the award, the appropriate date of accident is the last day of work. That conclusion is based on the finding that Mr. Lowdon returned to work for Affiliated after the initial injury on October 26, 1993, and performed heavy, strenuous labor as he eventually returned to both the truck loader and the drive order filler positions. Both of those jobs required Mr. Lowdon to lift and stack heavy grocery items. Between October 1993 and August 1996, Mr. Lowdon's back symptoms progressively and gradually worsened to the point he could

no longer perform even the easier and lighter jobs that Affiliated provided and he had no choice but to leave work. The Appeals Board finds that Mr. Lowdon continued to sustain repetitive microtraumas to his low back through his last day of work for Affiliated. Further, Mr. Lowdon failed to prove to what extent, if any, the October 26, 1993 accident caused permanent injury or impairment.

(7) Affiliated and its insurance carrier argued that Mr. Lowdon sustained additional injury around late May or early June 1994 when he threw some pitches for his daughter's softball team. Mr. Lowdon testified that he experienced increased symptoms after pitching a softball several times to some of his daughter's teammates, but that those symptoms immediately resolved. Dr. Drisko testified that he did not believe the softball incident caused Mr. Lowdon any permanent injury or impairment. Based upon that testimony, the Appeals Board finds that the softball incident did not cause additional permanent injury to Mr. Lowdon's back but only temporarily aggravated it.

(8) Mr. Lowdon made a good faith effort to perform the various light duty jobs that Affiliated assigned him. But, he has failed to establish that he has made a good faith effort to find appropriate employment since he left Affiliated. That conclusion is based upon the record that indicates Mr. Lowdon applied at only 10 to 15 potential employers in the one year period between his last day of work at Affiliated in August 1996 and the date of regular hearing in August 1997.

(9) Mr. Lowdon has lost the ability to perform 29 percent of the job tasks that he performed in substantial and gainful employment during the 15-year period before his injury. That conclusion is based upon the opinions expressed by Dr. Drisko.

(10) According to vocational rehabilitation counselor Michael J. Dreiling, Mr. Lowdon retains the ability to earn $6.00 per hour, or $240 per week, despite the low-back injury. Comparing $240 to Mr. Lowdon's stipulated $444 pre-injury average weekly wage yields a 46 percent difference.

CONCLUSIONS OF LAW

(1) Because his is an "unscheduled" injury, Mr. Lowdon is entitled to receive permanent partial general disability benefits as defined by K.S.A. 1996 Supp. 44-510e. That statute provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and

> the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(2) As indicated above, Mr. Lowdon failed to establish that he has made a good faith effort to find appropriate employment since leaving Affiliated Foods. Therefore, a post-injury wage should be imputed based upon Mr. Lowdon's post-injury abilities for purposes of the wage loss prong of the permanent partial general disability formula. Also, as indicated above, Mr. Lowdon retains the ability to earn $240 per week, which is 46 percent less than what he was earning before the low-back injury began.

(3) As the permanent partial general disability formula requires, the 29 percent task loss is averaged with the 46 percent wage loss, which yields a 38 percent permanent partial general disability.

(4) Because the Appeals Board had earlier affirmed a preliminary hearing finding that Mr. Lowdon's injury was caused by the softball incident rather than a work-related accident, Affiliated and its insurance carrier argue that the Board should now make that same finding. The Appeals Board disagrees. The Workers Compensation Act specifically provides that preliminary findings are not binding but are subject to modification upon a full hearing on the claim.[3] Evidence is now before the Appeals Board that was not presented when the issue was first appealed to the Board from the preliminary hearing Order. Part of that additional evidence is Dr. Drisko's testimony, which directly addresses the issue.

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] K.S.A. 44-534a(a)(2).

AWARD

WHEREFORE, the Appeals Board modifies the Award as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Lawrence R. Lowdon and against the respondent, Affiliated Foods, Inc., and its insurance carrier, Fireman's Fund Insurance Company, for an August 5, 1996 accidental injury, and based upon an average weekly wage of $444 for 21 weeks of temporary total disability compensation at the rate of $296.01 per week or $6,216.21, followed by 155.42 weeks at the rate of $296.01 per week or $46,005.87, for a 38% permanent partial general disability, making a total award of $52,222.08.

As of October 7,1998, there is due and owing claimant 21 weeks of temporary total disability compensation at the rate of $296.01 per week or $6,216.21, followed by 92.29 weeks of permanent partial compensation at the rate of $296.01 per week in the sum of $27,318.76 for a total of $33,534.97, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $18,687.11 is to be paid for 63.13 weeks at the rate of $296.01 per week, until fully paid or further order of the Director.

The Appeals Board adopts the remaining orders as set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew S. Crowley, Topeka, KS
Steven J. Quinn, Kansas City, MO
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director